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No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

MICHAEL CLEMENTE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Questions Presented.*

I. Whether the so-called "RICO" Act (18 U.S.C. §§ 1961 *et seq.*) is applicable to an enterprise which, according to the government, consists of a group of individuals "associated in fact to corruptly control and influence" an industry?

II. Whether the defendant's conviction of RICO conspiracy must still be reversed even if the government's theory of enterprise is sustained?

III. Whether all the remaining counts must also be reversed for a new trial if the RICO and RICO conspiracy counts are reversed, because they were inevitably tainted by the spillage from the RICO counts?

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* The parties to this case, aside from petitioner and the government, are petitioner's co-defendants at trial and on appeal: Thomas Buzzanca, Vincent Colucci, Carol Gardner, Michael Copolla and Gerald Swanton.

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Opinion Below.

A copy of the opinion of the United States Court of Appeals for the Second Circuit, decided February 26, 1981, is annexed as an appendix to the petition for certiorari in the companion case of Tino Fiumara, Thomas Buzzanca and Michael Coppola. Petitioner herein relies on and incorporates that appendix.

Jurisdiction.

a) The judgment of conviction was rendered the 20th day of June, 1980.

b) The order and judgment of affirmance of the United States Court of Appeals is dated the 26th day of February, 1981. On April 22, 1981, Mr. Justice Thurgood Marshall issued an order extending the time for filing this petition to May 27, 1981. That order is attached to this petition as an appendix.

c) Jurisdiction to review the judgment in question by certiorari is conferred under 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved.

The constitutional provision involved is the Due Process Clause, Fifth Amendment, United States Constitution.

The statutes involved are 18 U.S.C. §§ 1961(4), 1962(a), 1962(b), 1962(c) and 1962(d). These have been reproduced in the appendix of the companion petitions and are relied on by petitioner.

Statement of the Case.

Petitioner Clemente, a private businessman, was charged with being part of a small group of men who sought to control the unions and businesses on the waterfront. The group with which he was allegedly associated had no formal structure or legitimate purpose. It was, according to the government, essentially a conspiracy. Yet petitioner was charged with a violation of the RICO statute and also with conspiracy to

violate the RICO statute. The RICO "theory" constituted the basis, as well, for the other charges brought against petitioner.

Appellant Clemente stands convicted of 103 counts of violating federal law and sentenced to 20 years of imprisonment (a sentence, in effect, of almost certain life imprisonment, considering his age — 73 — and the parole guidelines applicable to his case). Broken down to their constituent acts, Clemente's 103 convictions actually reflect only three alleged sets of transactions.

The first set of transactions consisted of the receipt of $42,000 in payments from William Montella, an employee of the Quin Companies "as a condition of and in exchange for Quin's obtaining and retaining carpentry and lashing business" from the Netumar Shipping Lines ("Netumar"). The receipt of this money — paid in monthly installments over a four and a half year period — was broken down by the government into 56 separate counts of extortion. Clemente was convicted of each count of extortion, despite the undisputed fact that there was no "physical fear or fear of violence" in this case. Nor was Clemente an official or employee of any union, corporation or government. He is a self-employed private businessman who received payment for helping a company obtain and retain lucrative business from another company.

The second set of transactions involved an isolated conversation with William Montella about monthly payments of $2,000 that Montella had already been making to defendants Gardner and Colucci from June, 1975 until December, 1975. When Gardner and Colucci apparently attempted to increase the monthly payment rate, Montella went to see Clemente for advice. According to Montella, at this meeting Clemente told him not to pay Gardner and Colucci and to go see Mr. Buzzanca. The crux of the government's case against Clemente is what Montella claimed Clemente said in addition to these

statements: namely that he told Montella that since he had made a commitment he now had to live up to it. Although there is absolutely no evidence that appellant Clemente was aware that any payments were actually made by Montella to Buzzanca following his conversation, and although the effect of Clemente's involvement was to prevent the payment of additional money allegedly being demanded of Montella, Clemente was charged with, and convicted of, 34 separate counts of aiding and abetting 34 separate violations of the Taft-Hartley Act (each count representing an installment paid by Montella to Buzzanca without Clemente's knowledge).

The third, and most peripheral, set of transactions related to Clemente's alleged failure to report and pay income tax on the money he received from Montella as alleged in the extortion counts, and for a far greater amount of money he received from Netumar. Clemente was charged with, and convicted of, 10 separate counts relating to his income taxes: 5 counts of tax evasion for the years 1973 to 1977; and 5 counts of filing false returns relating to the same income during the same years.

These three sets of transactions accounted for 101 of the 103 counts on which Clemente was charged and convicted. The remaining two counts — RICO and conspiracy to commit RICO — were built on the foundation of the extortion and Taft-Hartley convictions and charged Clemente with being associated with and conspiring with an "enterprise, to wit, a group of individuals associated in fact to corruptly control and influence the waterfront . . . ."

Reasons for Granting the Writ.

I. The Government's Theory of Enterprise was Improper under the RICO Act.

This case squarely raises an issue currently pending before this Court over which the Circuits are irreconcilably divided:

whether the RICO Act (18 U.S.C. §§ 1961 *et seq.*) is applicable to an enterprise which, according to the government, consists of a group of individuals "associated in fact to corruptly control and influence" an industry.

The government tried this case on the theory that the RICO enterprise at issue was an "association in fact" formed for the very purpose of committing the criminal activity charged in the indictment. Counts 1 and 2 of the indictment described the enterprise as:

> a group of individuals associated in fact to corruptly control and influence the waterfront industry in the Port of New York and other ports in the Eastern United States and to enrich themselves and their associates.[*]

The convictions were affirmed squarely on the holding of the Second Circuit that "the term 'enterprise' embraces both legitimate and illegitimate enterprises." The Court of Appeals acknowledged that there was a "split of authority on this issue" among the circuits. There is such a split, and the circuits which have held that the RICO Act was not intended to apply to allegedly unlawful associations in fact — such as the one alleged here — are plainly correct.

The recent opinions in *United States* v. *Turkette*, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 101 S.Ct. 938 (1981), and *United States* v. *Anderson*, 626 F.2d 1358 (8th Cir. 1980), demonstrate that a case which proceeds on such a theory of enterprise is fundamentally at odds with the structure, logic and legislative history of the RICO statute. Indeed, the opinions in *Turkette* and *Anderson* speak so convincingly for themselves that there is no need for defendant to paraphrase them here. Suffice it to say that defendant fully relies on each

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[*] See also T. 11424, where the prosecutor quoted this language in his summation.

of the points made by these opinions, and submits that this Court must conclude that the theory of enterprise on which the present case was tried is untenable.

The legislative history of the RICO Act has also been elaborated in the *Anderson* and *Turkette* opinions, as well as in the briefs submitted before this Court in the latter case. They will not be repeated here.

If this Court affirms the *Turkette* decision, petitioner respectfully requests it to reverse these present convictions, or — at the very least — remand them to the Court of Appeals for reconsideration in light of the *Turkette* decision.

II. Even if the Government's Theory of Enterprise is Sustained, the Defendant's Conviction of RICO Conspiracy must still be Reversed.

A. *If the Government's Theory of Enterprise is Accepted, the Crime of RICO Conspiracy Becomes Unconstitutionally Vague and Unintelligible.*

One of the problems created by defining enterprise to include an association in fact formed for the very purpose of committing a pattern of racketeering activity, is that it renders the enterprise element indistinguishable from a simple conspiracy to commit the predicate crimes. This in turn makes it impossible to fathom the meaning of a conspiracy under 18 U.S.C. § 1962(d) to violate 18 U.S.C. § 1962(c).

If this Court rejects *Anderson* and *Turkette*, and accepts the government's theory of enterprise, it will have no choice but to attempt to negotiate the definitional Serbonian bog which the *Anderson* court avoided. No intelligible definition of a § 1962(d) conspiracy to violate § 1962(c) would be possible.*

* Indeed, the Eighth Circuit in *Anderson* found that defining enterprise in the way indicated made it so difficult to understand the nature of a § 1962(d) conspiracy to violate § 1962(c), that this difficulty itself demonstrated the need to reject such a definition of enterprise.

The substantive offense described in § 1962(c) has two distinct parts. First, a person must be "employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce." Second, that person must "conduct or participate, directly or indirectly, in the conduct of [that] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." While § 1962(d) states that it shall be unlawful to conspire to violate § 1962(c), it does not specify how the factor of conspiracy should be applied to the two parts of the substantive offense. There are at least *two* possibilities: First, § 1962(d) may be saying that it is unlawful to conspire to *both* (a) join an enterprise, *and* (b) participate in the affairs of that enterprise through a pattern of racketeering. Second, § 1962(d) may be saying that it is unlawful for a person who is *already* a member of an enterprise, to conspire to participate in the affairs of that enterprise through a pattern of racketeering. If enterprise is defined as including a group of persons associated in fact to commit a pattern of racketeering activity, *neither* alternative is intelligible. The first alternative becomes incomprehensible because it makes no sense to speak of someone conspiring to join a group of persons associated in fact, or, more simply, of someone *conspiring to conspire*. The second alternative also becomes incomprehensible because, given the government's definition of enterprise, this alternative, when spelled out, turns into the following:

> It shall be unlawful for any person engaged in a conspiracy to commit a pattern of racketeering activity which affects interstate commerce to conspire to participate in the conduct of the conspiracy's affairs through a pattern of racketeering activity.

Needless to say, if, as demonstrated above, RICO conspiracy is *incomprehensible*, it is necessarily unconstitutional under the void-for-vagueness doctrine established in such cases as *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-403 (1966); and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). Thus, for this reason, defendant's conviction of RICO conspiracy must be reversed.

B. *The Trial Judge Failed to Instruct the Jury Adequately on the Connection It Had to Find Between the Defendant Under Consideration and the Pattern of Racketeering Alleged in the Indictment.*

The trial judge's instructions on Count 2 of the indictment are characterized by an overemphasis on principles of *general* conspiracy law, at the expense of any meaningful discussion of the unique attributes of *RICO* conspiracy.

No charge on RICO conspiracy can be sufficient unless it explains in a "clear, accurate, complete and comprehensible" fashion that a person cannot be convicted of a § 1962(d) conspiracy to violate § 1962(c), absent proof that he had the specific intent to violate § 1962(c).

Since the predicate crimes alleged to constitute a pattern of racketeering activity lie at the core of the offense defined by § 1962(c), a specific intent to violate § 1962(c) must be defined in terms of a specific intent to commit those crimes. Similarly, since the element of enterprise is also central to a § 1962(d) offense, a definition of specific intent to violate § 1962(c) must also incorporate the concept of enterprise. Putting these two elements together, it is clear that, at minimum, the trial judge should have instructed the jury that it could not convict a person of RICO conspiracy unless it found that, being a member

of a RICO enterprise, he entered into an agreement with others with the specific intent to participate in the affairs of the enterprise *through* the commission of two or more predicate crimes forming part of the overall pattern of racketeering activity charged in the indictment.

Instead of instructing the jury in this way, however, the trial judge referred to the element of intent only in the most general way, as follows:

> In a conspiracy case, the government must prove beyond a reasonable doubt that the defendant entered into the conspiracy with a criminal intent, with a purpose to violate the law. [T. 12619.]

The judge never applied this concept of intent to the concept of the elements of § 1962(c). Such a combination was essential to a proper definition of the specific intent which the jury was required to find. Without this combination, the judge's comments about intent remained hopelessly isolated, vague and misleading.

Indeed, not only did the judge fail to define intent in terms of the elements of § 1962(c), he referred to those elements only *once* during his entire charge on Count 2, and referred to them incorrectly at that. Thus, the judge stated:

> In this case, the defendants Clemente, Fiumara, Buzzanca, Colucci, Gardner and Copolla are charged with a conspiracy to violate the RICO statute by conducting the affairs of an enterprise through a pattern of racketeering acts. In order to find the defendant you are considering guilty of the conspiracy charged in the indictment, you must find beyond a reasonable doubt that at least two connected violations of one or both of the two statutes

> that I have just described to you in connection with Counts 3 through 142, were objectives of the conspiracy. [T. 12614-12615.]

This statement is plainly incorrect. A particular defendant *cannot* be convicted of RICO conspiracy simply on the basis that *a* conspiracy of which he was a member had as *its* objective the commission of any two connected predicate crimes charged in the indictment. Rather, a particular defendant can be convicted of RICO conspiracy only on the basis that *he* entered into an agreement with the *personal* objective (*i.e.*, specific intent) of participating in the enterprise's affairs *through* the commission of two or more predicate crimes constituting a pattern of racketeering activity. In short, the trial judge's formulation totally leaves out (a) the requirement of *personal* specific intent, and (b) the requirement that a defendant intend not only the commission of predicate crimes but participation in the enterprise's affairs *through* the commission of predicate crimes.*

Consequently, defendant's conviction of RICO conspiracy must be reversed because of these critical defects in the judge's instructions.

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*The prejudice which the defendant suffered here as a result of these defects in the judge's instructions is especially apparent because of the factual issue in the case of whether, even if the government's evidence was credited, there was one RICO enterprise and one RICO conspiracy or several. Under the instructions given by the trial judge, the jury could have convicted defendant Clemente of RICO conspiracy not on the basis that *he* intended to participate in a joint Manhattan-Newark RICO enterprise through two or more predicate crimes, but rather simply on the basis that he was associated with *other* defendants, one of which *other* defendants had the intention to participate in the affairs of a strictly Newark enterprise through two or more predicate crimes.

III. If the RICO and RICO Conspiracy Counts are Reversed, all the Remaining Counts Must also be Reversed for a New Trial Because they were Inevitably Tainted by the Spillage from the RICO Counts.

The structure, tone and texture of this case were all set by the RICO and RICO conspiracy counts which headed the indictment. From the outset, the prosecutor emphasized that the government's goal in this case was to prove not merely that the defendants engaged in a series of discrete criminal acts, but that they were involved in an ongoing and all-pervasive enterprise to "corruptly control and influence the waterfront industry in the Port of New York." Indictment, Count 1, ¶ 1. Thus, in his opening, the prosecutor stated:

> At its core it is a story of a small group of men acting secretly, dishonestly and powerfully to control the unions and the businesses in this port so that businessmen in this port will believe and will act in a way that means they have to make payoffs to labor officials and the man behind labor officials in order to stay in business and in order to get business and in order to keep business. [T. 1361.]

And, the prosecutor returned to this theme in his summation [T. 11216].*

Because the RICO counts so dominated the trial of this case, established principles of law require that if the RICO convictions are found tainted, defendant Clemente must be granted a new trial on the extortion, Taft-Hartley and tax counts because they were inevitably infected by the taint.

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*See, *e.g.*, government summation, T. 11222, 11226, 11239, 11254-56, 11258, 11265, 11267, 11277, 11283, 11254, 11290, 11291, 11371, 11501.

The magnitude of the spillage from the RICO counts on the other counts of the indictment may be guarded by imagining just how different the trial of these other counts would have been absent the RICO counts:

1. Without the RICO counts, the prosecution would have been deprived of the theme of criminal enterprise which it injected into every aspect of the case. It was the RICO counts, and the RICO counts alone, which afforded the prosecution such broad license in referring repeatedly to defendant Clemente's alleged "power," "influence" and "control". And it was these counts alone which enabled the prosecution to stigmatize Clemente as "the single most important person in [the] enterprise." [T. 11217.] Ordinarily, such broad accusations of criminality, untied to specific instances of alleged misconduct, are considered to be anathema to elemental principles of due process. And if the prosecution had sought to level them in a trial limited to the extortion, Taft-Hartley or tax counts, they would certainly have been excluded under the familiar rules designed to protect a person from conviction on the ground of a supposed "criminal disposition" or "criminal character". But here the accusations were permitted, solely because of the RICO counts.

2. Without the RICO counts, the prosecution would have had no basis for joining the New Jersey defendants (Fiumara, Buzzanca, Colucci, Gardner, Copolla) and the New Jersey charges with the New York defendants (Clemente, Swanton) and the New York charges. Indeed, defendant contends that the prosecution had inadequate basis for such joinder even with RICO. Absent RICO, the arguments against such joinder — and the reciprocal prejudice which violated the rights of all defendants — would apply *a fortiori*.

3. Without the RICO counts, the prosecution would have had no basis for injecting into the trial the evidence of the more than one million dollars in payments which Netumar

made to Clemente. See Indictment, Count 1, ¶ 10. The prosecution did *not* contend that these payments were compelled by extortion or were otherwise illegal. Evidence concerning them was received for essentially two reasons: (1) to show that "Clemente in fact exercises power and influence in matters with respect to the waterfront" [T. 12686]; and (2) to show the origin of the bulk of the income which was the subject of the tax counts against Clemente [T. 12684-86]. Absent RICO, the first justification disappears, and the argument for excluding the evidence (except in a severed trial on the tax counts) becomes irresistible, especially in light of the fact that the prosecution conceded that it was *not* contending that the payments were themselves illegal. The significance of this cannot be underestimated, because the amount of money involved in the Netumar payments dwarfed the aggregate amount of money involved in the Taft-Hartley and extortion counts. Indeed, even with the RICO counts, defendant contends that evidence of the Netumar payments should have been excluded because of the inevitable and patently unfair implication that the size of the Netumar payments indicated the true scope of the alleged criminal enterprise at issue. At any rate, without RICO, it is clear *a fortiori* that the prejudicial effect would have overwhelmed any possible claim of probative value.*

4. Without the RICO counts, the underlying substantive charges against Clemente would have been seen as three isolated and ambiguous transactions. As previously demonstrated, these transactions, if presented to the jury as they should have

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*In addition to arguing its relevance on the RICO counts, the prosecution lamely argued that the Netumar payments were relevant to the extortion counts to show the reasonableness of Montella's fear that Clemente was in a position to harm him. This is precisely the kind of tenuous claim of relevance that would clearly have been outweighed by potential prejudice, in the absence of the prosecution's claim concerning relevance to the RICO counts.

been — untainted by charges of massive corruption and control — would have seemed like the actions of a legitimate business person such as an influential movie agent, and would have been viewed as entirely innocent. But when seen in the context of the RICO claims made here, they took on a sinister aspect and resulted in the conviction at issue.*

In sum, if the RICO counts are reversed, the prejudicial spillage requires that the other counts in the indictment must be reversed as well.

IV. PETITIONER CLEMENTE ADOPTS AND INCORPORATES BY REFERENCE THE REASONS AND ARGUMENTS PRESENTED IN THE PETITIONS FOR CERTIORARI SUBMITTED BY HIS CO-DEFENDANTS FIUMARA, BUZZANCA, COPPOLA, COLUCCI, GARDNER AND SWANTON.

Conclusion.

The RICO statute is out of control. It is being applied by overzealous prosecutors to all manner of enterprises that were never intended to come within its ambit. It has become the new darling in the federal prosecutor's nursery. Coupled with

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*One concrete example of how the prosecution manipulated this prejudicial spillage effect from RICO is provided by its summation concerning the Taft-Hartley charges. The prosecution's case against Clemente concerning these charges was marred by an obvious lack of evidence that Clemente did anything to follow-up his conversations with Montella and Buzzanca. To bridge this gap in its case, the prosecution resorted to the ever-malleable claims of RICO enterprise, stating in effect that Clemente's role in that enterprise transformed the isolated conversations into multiple violations of law. (See T. 12323-24.) Similar "RICO-type control" arguments were made in the extortion part of the summation. See, *e.g.* (T. 11247): "Montella starts to see Clemente, paying him $500 a month, just the way he told you, and that's the beginning of the whole effort by this *enterprise* to get money out of Montella and others at least as far as we know about it from the evidence in this case."

conspiracy charges — which is what was done in the instant case — it knows no constraints nor limits. This Court should grant the petition in this case to consider the relationship between the RICO and conspiracy statutes in the context of an alleged "in fact" enterprise which has no legitimate function. This petition raises these important issues — about which there is conflict among the circuits — squarely and directly.

Respectfully submitted,

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Appendix.

Supreme Court of the United States

No. A-880

MICHAEL CLEMENTE,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 27, 1981.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 22nd
day of April, 1981.